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OCTOBER TERM, 1973

NO. 73-628

RIVERSIDE PRESS
MEMPHIS, TENNESSEE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-628

ALLENBERG COTTON CO., INC.
Appellant,

v.

BEN E. PITTMAN,
Appellee.

On Appeal from the
Supreme Court of Mississippi

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal on the grounds that appellant failed to properly raise a substantial federal question in the state court proceedings. In the alternative, appellee moves the Court to dismiss the appeal or affirm the judgment of the Supreme Court of Missisippi on the ground that it is manifest that the question on which the decision depends is so insubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTE

This appeal raises the question of the application of certain provisions of the Mississippi Business Code pertaining to foreign corporations doing business in the State of Mississippi. Similar to enactment by a majority of states,[1] the code prohibits utilization of courts in the state by foreign corporations transacting business without a certificate of authority from the Secretary of State.[2] Definitional provisions[3] provide exemptions for certain types of commercial activity; the most important for purposes of the present case being the transaction of any business in "interstate commerce."[4]

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[1]Thirty states have adopted the Model Business Code, including the penalty provision of exclusion from state courts of foreign corporations who do business in a state but who fail to qualify to do so. Note, *Sanctions For Failure to Comply with Corporate Qualifications Statutes: An Evaluation*, 63 **Colum. L. Rev.** 117(1963). This recent commentary concludes that this technique for dealing with foreign corporations is "[T]he broadest and most effective sanction provided for non-compliance". *Id.* at 126.

[2]**Miss. Code Ann.** Sec. 79-3-247 (1972), *formerly* **Miss. Code Ann.** Sec. 5309-239 (1942).

[3]**Miss. Code Ann.** Sec. 79-3-211 (1972), *formerly* **Miss. Code Ann.** Sec. 5309-221 (1942). All sections are identical to those included in the Model Business Corporation Act.

[4]**Miss. Code Ann.** Sec. 79-3-211 (e), *formerly* **Miss. Code Ann.** Sec. 5309-221 (e) (1942). Appellant has now dropped the contention made before the Mississippi Supreme Court that it was entitled to exemption on the basis of subsection (d) which provides that: "Soliciting or procuring orders whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts."

B. THE PROCEEDINGS BELOW

Allenberg is a cotton broker in Memphis, Tennessee.[5] In Mississippi (as in other cotton-producing states)[6] it employs agents on a commission basis to secure contracts specifying prices to be paid for cotton crops to be grown in the future.[7] Pittman owns approximately 700 acres of cropland in Marks, Mississippi. In January, 1971, following conferences with Allenberg's agent, he contracted to deliver his 1971 crop to Allenberg at a designated warehouse in Marks.[8] Delivery of cotton completed the obligation and payment was to be made on the basis of the quality of cotton delivered.[9]

Pittman's failure to comply with the agreement resulted in a breach of contract action[10] brought by Allenberg in the

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[5]Allenberg emphasizes the importance of the present case in the context of detailed data with respect to the entire marketing industry. *E. g.*, *Jurisdictional Statement* 23 (quoting testimony of Neal P. Gillen, General Counsel of the American Cotton *Shippers* Association). Brokers form a part of the industry represented by this trade association.

Also involved in commercial transactions throughout the United States, however, are local agents, mill buyers, gin owners, shippers, and cooperative marketing associations. *See* United States Department of Agriculture, *The Marketing & Transportation Situation* 12, 16 (ERS-340) (1970); B. Franklin, *Marketing the 1970 Upland Cotton Crop* 13 (GS-253 1971); 53 *Weekly Cotton Market Report* 35 (1972).

[6]Allenberg is qualified in Texas (1971); Arkansas (1973); Missouri (1973); Alabama (1973); Georgia (1973); Louisiana (1973); North Carolina (1973); and South Carolina (1973); *See* Appendix B. On May 29, 1973, it qualified in the state of Mississippi. *Id.* The record also indicates qualifications in Arizona, California, and Texas. (Record at 91). Taking these three steps to comply with the laws of the states in which it is negotiating transactions relating to cotton obviously precludes similar litigation.

[7]The extent of this activity in Mississippi is revealed by the fact that one county alone approximately 25 contracts were signed covering some 9,000 acres for the year 1971. (Record at 51).

[8]The contract also specified that Pittman was to harvest his crop and have it ginned (cleaned) at a gin in Marks specified in the contract. (Record at 7).

[9]The form contract specified a sliding scale of payments geared to the quality of cotton produced. (Record at 7).

[10]The action also requested injunctive relief. (Record at 5).

Chancery Court of Quitman County. Pittman's defense was based on the provisions of the Mississippi Business Code precluding access by foreign corporations to state courts upon failure to secure a certificate of authority to do business in the state. The defense was denied and judgment rendered for Allenberg. On appeal the Mississippi Supreme Court reversed. The opinion concluded that the nature of Allenberg's business, coupled with the specifics of the contract involved (negotiated in the state; intrastate delivery, storage), mandated the conclusion that Allenberg — as a prerequisite to the maintenance of commercial arrangements cognizable and enforceable in the courts of the state — must comply with the statutory requirement of securing a certificate of authority from the Secretary of State.

II. *ARGUMENT*

A. FAILURE TO RAISE A SUBSTANTIAL FEDERAL QUESTION IN THE PROCEEDINGS BELOW REQUIRES DISMISSAL OF THE ACTION.

It is essential to the jurisdiction of the Supreme Court under 28 U.S.C. 1257 that a substantial federal question be properly raised in the state court proceedings.[1] This case does not meet this criteria.

(1) *Certification:* Subsequent to final decision by the Mississippi Supreme Court,[2] Allenberg requested and received an extension in which to file its Jurisdictional Statement. As stated in the motion presented to Mr. Justice Powell:

> The need for this extension arose because of present counsel's uncertainty whether the federal question was timely raised in the Supreme Court of Mississippi. (Appendix A)

Subsequently, a certificate signed by the Chief Justice of the Mississippi Supreme Court was secured. (Jurisdictional Statement 13-14). It states that arguments relating to protections afforded by the Commerce Clause of the United States Constitution were argued and considered. Allenberg now contends that this certificate is binding upon this Court with respect to the issue of a federal question and the proceedings below. *Jurisdictional Statement 14.*

In cases where it is unclear whether the federal question was raised and/or decided, significant weight will be given to a certificate issued by the *state appellate court.*[3] A certificate signed by a Chief Justice of a state court is an altogether different matter. As stated in *Charleston Fed. Savings & Loan Assn. v. Alderson,* 324 U.S. 182, 186, n. 1 (1945):

> While a certificate of the state court, made part of the record, to the effect that the federal question in issue was decided there is *generally sufficient* to sustain our jurisdiction, when it is consistent with the record . . . *a certificate to the same effect by the presiding justice of the state appellate court does not suffice,* although it may serve to interpret indefinite or ambiguous evidence in the record, relied upon to show that the federal question was raised. (Emphasis added.)

In determining whether the federal question was properly raised, the proceedings below are therefore subject to close scrutiny by this Court.

(2) *Proceedings Before the Chancery Court:* — Pittman asserted a single defense: not having qualified to do business in the state, Allenberg waived its right to use the courts. (Record at 23). After detailed presentation of evidence by

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[1]Thus, it is necessary, in an appeal under subsection (2), that the validity of a statute must have been "drawn in question." For purpose of certiorari under subsection (3), the validity of a statute must have been "drawn in question" or a federal title, right, privilege or immunity must have been "*specifically* set up or claimed," under the Constitution. (Emphasis added.) Requirements of these sections are substantially identical, **R. Stern & E. Gressman, Supreme Court Practice** Sec. 3.25, at 116 (4th ed. 1969) [hereinafter cited **Stern & Gressman**]

[2]Following a motion for rehearing discussed at p.10, *infra.*

[3]*See, e.g.*, Herb v. Pitcairn, 324 U.S. 117, 128 (1945); **Stern & Gressman,** *supra* note 1, Sec. 3.29, at 128, and cases cited therein; Wolfson & Kurland, *Certificates by State Courts of the Existence of a Federal Question,* 63 **Harv. L. Rev.** 111 (1949).

both sides relating to Allenberg's business activities, the court — without explaining the grounds for decision — ruled against Pittman and entered judgment in the amount of $18,156. (Record at 126a). At no time during the proceedings did Allenberg specifically allege that its activities were protected by the Commerce Clause of the Constitution nor claim invalidity of Pittman's defense on this ground.[4]

(3) *Proceedings Before the Mississippi Supreme Court:* — On appeal, Pittman assigned as error failure of the Chancery Court to dismiss the case on the grounds that Allenberg was not qualified to do business in the state. (Appellant's Assignment of Error at page 1) Under Mississippi practice, Allenberg (having won below) was not required to make a similar delineation of issues raised by the case.[5] Compliance with Rule 15(d)[6] can only be determined by a review of briefs filed.[7]

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[4]The decree of the Chancellor rested on the singular finding that Allenberg was "doing business" within the State of Mississippi. (Record at 114a). *Jurisdictional Statement* 13. Not having the benefit of a written or oral opinion, one can only speculate as to the legal basis for the decision, *i.e.*, Allenberg was doing business by soliciting orders by agents, engaging in interstate commerce, or some other exception to the requirements of securing a certificate to do business.

It should also be noted that if Allenberg had lost in the trial court, its failure to allege a constitutional claim would have precluded its being raised on appeal. Nationwide Mut. Ins. Co. v. Tillman, 249 Miss. 141, 161 So. 2d 604 (1964); County Bd. of Ed. v. Smith, 239 Miss. 53, 121 So. 2d 139 (1960). "Whether the statute violates section 33 of the Constitution was raised for the first time in this court . . . It was neither presented to, considered, nor passed on, but the trial court. It is a long established rule in this state that a question not raised in trial court will not be considered on appeal . . . ." Adams v. Bd. of Supervisors, 177 Miss. 403, 414, 170 So. 684, 685 (1936).

[5]The Rules of the Mississippi Supreme Court make no such provision.

[6]Requiring specification of the stage in the proceedings in the appellate court at which, and the manner in which, the federal question sought to be reviewed was raised.

[7]This is well within the power of this Court. Beck v. Washington, 369 U.S. 541, 553 (1962) (federal question not adequately presented when mentioned in one sentence of a 125-page brief); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 313 n. 6 (1968) (noting failure to raise the issue in brief before state appellate court). *But see, e.g.*, Zadig v. Baldwin, 166 U.S. 485 (1897) (briefs and oral argument before state supreme court not to be considered.)

Pittman argued as a matter of Mississippi law that Allenberg was a foreign corporation doing business in the state without a certificate and therefore not entitled to access to the courts.[8] Allenberg's brief responds with the contention that "strict construction" of the Code is in order.[9] It continues in much the same tone, distinguishing Mississippi cases[10] and arguing for a compatible construction of the code itself.[11]

The final portion makes reference to the term "interstate commerce" in the context of its inclusion in the Mississippi

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[8]The entire presentation on behalf of Pittman related solely to Mississippi cases and the wording of the Mississippi Business Code.

[9]"**Miss. Code Ann.** Sec. 5309-239 . . . outlines the penal sanctions imposed upon a foreign corporation, transacting business within this state without having previously qualified. The sanction includes the denial of access to the state courts of Mississippi for the prosecution of its claims. Since the statute is penal in nature, it must be strictly construed [citing Mississippi precedent] . . . . It logically follows that being a vital element of the application [of the statute] . . . the determination of what constitutes transacting business must be made in a manner which protects the rights of the corporation which is to be punished by such a finding. This determination is controlled by **Miss. Code Ann.** Sec. 5309-221. . . ." (Brief for Appellant, Mississippi Sup. Ct. 4).

[10]*E. g.*, Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So. 2d 615 (1951).

[11]But one does not have to deal in inferences or stretch legislative intention beyond all imagination to see that the Mississippi Business Corporation Act plainly, on its face, says that a foreign corporation is not doing business in the state by soliciting contracts by agents or otherwise when the contracts require acceptance without this state before becoming binding. The *law of this state prior to the enactment* of the Model Business Corporation Act was completely in harmony with the position urged (by Allenberg) [citing a long line of Mississippi cases]. . . ." (Emphasis added).

This portion of the brief is, in turn, followed by noting a diversity case decided by the Northern District of Mississippi. Its applicability is stressed as correctly construing the Mississippi Code "following previous Mississippi authority." Brief for Appellant, Miss. Sup. Ct. at 10. The case is Humboldt Foods, Inc. v. Massey, 297 F. Supp. 236 (N.D. Miss. 1968).

Code[12] and not as to the interpretation given to it in cases construing Art. I, Sec. 8, *i.e.*, "commerce . . . among the several states." Following a reiteration of the facts of the transaction in issue (with the conclusion that this constituted a delivery *within the meaning of* of the Mississippi Business Code)[13] Allenberg terminates the body of its presentation with the following analysis:

> [Pittman] further argues that the intent of the legislature in enacting the statues under analysis was to protect the citizens of this state. Surely this is true with regard to every statutory enactment of that body. But appellant's argument is clearly inapplicable to the decision of this tribunal in that, as has been heretofore cited, the instant situation being listed as an exception to the general statutory rule, *clearly is controlled by that statute which appellant himself attempts to invoke.* Id. at 14 (Emphasis added.)

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[12] "[Allenberg] further contends that the contract giving rise to the instant action was interstate in nature. Therefore, under subsection (e) of **Miss. Code Ann.** Sec. 5309- 221 . . . the appellee is specifically excepted from the application, of the body of, the statute . . . ." Brief for Appellant, Miss. Sup. Ct. at 11. The threshold proposition is followed by quotations from **AM. JUR.** 2d relating to purchases of goods and interstate commerce. Notably, this is the only portion of the brief (other than remarks in the "Conclusion" section) that gives *any* indication of reliance by appellant on a construction of the Mississippi statute other than that which has been given by the Mississippi Supreme Court.

[13] "[C]are must be taken to make reference to the particular clause of the federal constitution . . . as well as the rights claimed thereunder. **Stern & Gressmann,** *supra* note 1, Sec. 3.26 at 117. The issue of whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question. Street v. New York, 394 U.S. 576 (1969). A general allegation of the commerce clause is obviously insufficient. O'Neil v. Vermont, 144 U.S. 323 335 (1895). *See also* Herndon v. Georgia, 295 U.S. 441, 442-43 (1935) (reference to "Constitution of the United States" insufficient); Bowe v. Scott, 233 U.S. 658, 664-65 (1914) (taking of property "without due process of law"; no reference to United States Constitution, insufficient).

A parallel situation exists when claims are made under either the equal protection or due process clause where a state constitution contains a similar provision. In this situation it is clear that jurisdiction does not exist unless the federal provision is clearly specified. *See* New York v. Zimmerman, 278 U.S. 63 (1928).

The summary clearly indicates that at *no point* in its presentation did appellant lay claim to Art. I, Sec. 8, and the controlling federal construction given to the Commerce Clause.[14] The reply brief filed by Pittman responds only on matters of Mississippi law.

(4) *The Opinion of the Mississippi Supreme Court:* — Any deficiency in the particularity with which a federal issue is framed is cured if the highest state court assumes that a specific federal issue is properly before it and then expressly considers and determines that issue. *Saltonstall v. Saltonstall,* 276 U.S. 260, 267-8 (1928). If, however, the state court does no more than discuss the interpretation of the state statute without considering such interpretation in light of *federal* constitutional provisions, this Court cannot consider the federal points. *Beck v. Washington,* 369 U.S. 541, 549-550 (1962).

The Mississippi Supreme Court — in accord with the arguments of the parties — cites no precedent by this Court in its decision. Appellant's presentation containing only sparse reflection on the term "interstate commerce" in the context of the statutory term of the Mississippi Code is only mirrored by the Mississippi Supreme Court opinion and its utilization of "interstate commerce".[15]

In *Central Greyhound Lines v. Mealey,* 334 U.S. 653 (1948), the state contended that appellant's constitutional claims with respect to the application of a gross receipts tax

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[14] "The fact that the opinion (viewed in light of the arguments made) is insufficient for jurisdictional purposes becomes clear in the context of a theoretical holding against Pittman, *i.e.*, Allenberg's activities fall within the "interstate commerce" exception of the Mississippi Code. Without specifying direct reliance on Art. I, Sec. 8, an "adequate state ground" would exist, precluding review by this Court. *See* Department of Motor Vehicles v. Rios, 410 U.S. 425 (1972) (invalid termination of driver's license; state and federal due process); California v. Krivda, 409 U.S. 33 (1972) (search found unreasonable; state provision paralleling fourth amendment).

[15] *Cf.* United States v. O'Brien, 391 U.S. 367, 383-84 (1968); Ely, *Legislative & Administrative Motivation in Constitutional Law,* 79 **Yale L.J.** 1205 (1970).

had not been raised before the New York Appellate Court. In rejecting this contention, the Court found the following factors persuasive: (1) Raising of the constitutional issue in the intermediate court system; and (2) The appellate court's conclusion that "there is no *constitutional* objection to taxation of total receipts here. This is not interstate commerce . . . ." 334 U.S. at 655. (Emphasis added.)

At no point in the proceedings below did Allenberg specifically claim protections afforded by the Commerce Clause. The Mississippi Supreme Court alluded to "interstate commerce," only in the context of interpreting the statutory provision as found in the Mississippi Business Code. Without more, the conclusion is that the state court was interpreting its own state law without the benefit of specific claims relating to federal rights.[16]

(5) *The Petition for Rehearing:* — On motion for on for rehearing, the appellant — *for the first time* — brought into play constitutional precedent as established by this Court, *i.e.* the case now relied upon in support of its Jurisdictional Statement, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). The motion was denied without opinion. The raising of specific federal claims in this context is not sufficient to vest this Court with jurisdiction. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-4 (1958); R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE Sec. 124, 83.27 (4th ed. 1969).

(6) *Conclusion:* — Counsel for Pittman conducted the entire litigation below on the assumption that the Mississippi Business Code and interpretive decisions by the Mississippi Supreme Court were controlling precedent. As indicated by

[16]A further consideration in the case is the fact that both sides were represented by competent counsel. Quite obviously, considerations relating to whether or not a federal question has been explicitly and correctly raised will differ according to the status of the litigants. *Compare* Gideon v. Wainwright, 372 U.S. 335 (1963) *with* D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 188 (1972).

the reason given for requesting an extension of time to file its Jurisdictional Statement and as conclusively demonstrated by the record made below, counsel for Allenberg conducted their portion of the litigation in a similar manner. Without having briefed or argued federal precedent the contention is now espoused that the certificate issued by the Chief Justice of the Mississippi Supreme Court is conclusive with respect to a sequence of events which never occurred. Under the controlling precedent of *Charleston Savings & Loan*, however, this certificate can only be utilized to "interpret indefinite and ambiguous evidence in the record, relied upon to show that the Federal question was raised." The evidence is not vague and indefinite; all references to "interstate commerce" (prior to the petition for rehearing) were to the term as utilized in the Mississippi Code, not the Commerce Clause. The certificate should be given no weight and the case dismissed.[17] If this Court concludes that the question argued in the case warrants its attention, it is suggested that the case be held pending a certification by the Mississippi Supreme Court as to the grounds for the decision.[18]

B. ALLENBERG'S BUSINESS ACTIVITIES ARE SUFFICIENTLY INTRASTATE AS TO REQUIRE SECURANCE OF A CERTIFICATE OF AUTHORITY.

The provisions of the Mississippi Business Code are formulated in a manner consistent with the state's exercise of its general police powers.[19] They are only applicable to cor-

[17]Finally, and with respect to the present certification, it should be noted that the opinion below was written by Justice Smith and not the Chief Justice. In Wolfson & Kurland, *Certificates by State Courts of the Existence of a Federal Question*, 63 **Harv. L. Rev.** 111, 117 (1949), policy considerations against single-judge certification are succinctly analyzed: "[T]here is good reason for not giving conclusive effect to the certificate of a state court's presiding or chief justice. One judge's understanding of the case does not necessarily reflect the understanding of the court. Many times in recent years a court has disrupted the understanding of the judge who authored the opinion."

[18]*Ibid.*

[19]Note, 79 **U. Pa. L. Rev.** 1119, 1121-23 (1931).

porations having sufficient contacts with the jurisdiction, *i.e.*, "doing business" to ensure that the state's interest in regulation required to qualify.[20] "Doing business", however, is not a phrase of art; rather it is a test of reasonableness to be applied in light of governing legal policies.[21] As pointed out by the appellant,[22] a lesser amount of business is required to justify taxation than is necessary to compel qualification, and still a smaller amount will suffice to render the foreign corporation amenable to service of process. In the present case the record conclusively shows that Allenberg — having thousands of acres under contract and resulting crop yields stored in innumerable warehouses in the state in its own name — is doing "sufficient business" to warrant the exercise

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[20]Pro forma requirements are set forth in **Miss. Code Ann.** Sec. 79-3-255 (1972), *formerly* **Miss. Code Ann.** Sec. 5309-262 (1942), *e.g.*, completing application form, paying of filing fee (minimum of $25; maximum $500), filing of annual reports.

[21]*See* Hutchison v. Chase & Gilbert, Inc., 45 F 2d 139, 142 (2d Cir. 1930); **Caplin, Doing Business In Other States** iii (1959). Generally, it may be said that for purposes of qualification the business done should involve continuity of act and purpose. *See, e.g.*, William L. Bonnell Co. v. Katz, 23 Misc. 2d 1028, 196 N. Y. S. 2d 763 (Sup. Ct. 1960); City of St. Louis v. Pub. Serv. Comm'n, 355 Mo. 448, 73 S. W. 2d 393 (1934). Isolated acts, or those of an unusual nature, generally will not constitute sufficient contact to require qualification unless they indicate an intention on the part of the corporation to engage in further activity of a substantial nature. *See, e. g.*, Wilson v. Williams, 222 F. 2d 692, 697 (10th Cir. 1955). Mississippi interpretation is in accord. Isolated transactions are insufficient; business performed must be substantial for purposes of the qualification provision. Snipes v. Commercial & Indus. Bk., 225 Miss. 345, 82 So. 2d 895 (1955), Newell Contracting Co. v. State Highway Comm'n., 195 Miss. 395, 15 So. 2d 700 (1943); Peterman Const. & Supply Co. v. Blumenfeld, 156 Miss. 55, 125 So. 548 (1930).

The interpretation given to the "interstate commerce" exception is also in accord with existing precedent. *See* Smith v. J. P. Seeburg Corp., 192 Miss. 563, 6 So. 2d 591 (1942) (interstate sales of phonographs; no certificate required); Morrison v. Guar. Mort. & Trust Co., 191 Miss. 207, 199 So. 110 (1940) (interstate loan transactions). *Cf.* Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22 (1948).

[22]*Jurisdictional Statement* 22n. 34.

of state power in all three areas.[23] The spectre of "interstate commerce" is now raised to claim immunity from qualification.

The law is clear on the subject. William Meade Fletcher, after noting the general rule that purchases of goods by foreign corporations for shipment to another state constitutes interstate commerce,[24] states:

> A mere purchase in the state, however, without a shipment outside the state does not constitute interstate commerce, *and a purchase is not in interstate commerce where the transaction is complete before interstate commerce begins, and the purchase makes no provision as to shipment to the foreign corporation outside the state.* (17 W. FLETCHER, CYCLOPEDIA CORPORATIONS 374-5 Sec. 8415 (1960)).[25]

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[23]Issacs, *Analysis of Doing Business*, 25 Colum. L. Rev. 1018 (1925); Kinnally, *What Constitutes Doing Business by a Foreign Corporation?*, 15 **Ind. L. J.** 520 (1940); Note, *Corporate Registration: A Fundamental Analysis of "Doing Business"*, 71 **Yale L. J.** 575 (1962). **Caplin, Doing Business in Other States** (1959).

[24]*Citing* Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

[25]In State v. Pioneer Creamery Co., 211 Mo. App. 116, 245 S. W. 362 (1922), an agent for the foreign corporation purchased cream, placed it in a storeroom and subsequently shipped it to the corporation in another state where it was turned into butter. Noting that the contracts of purchase called for intrastate delivery with a delay prior to interstate transit, the court rejected the contention that the business was interstate and therefore no certificate for doing business was required. The respondent's argument was conceptualized as follows: "It would naturally follow that every kind of business transacted in this state for the purchase of material of any kind, which was afterwards shipped to another state . . . would or could be made interstate commerce. The business transacted by the defendant in this state was separate and distinct from interstate commerce, and subject to the laws of this state governing foreign corporations." 245 S.W. at 363.

A contrasting situation is exemplified by Seneca Tex. Corp. v. Missouri Flower & Feather Co., 119 S. W. 2d 991 (Mo. App. 1938), where a foreign corporation was held subject to qualification when it shipped goods from the foreign state to warehouses within the state requiring qualification. Filling of orders from customers from this facility held to be an intrastate business. *See also* John I. Haas, Inc. v. Ellis, 227 Ore. 170, 361 P. 2d 820 (1961). (Excise tax imposed on hops brought from farmers stored prior to intrastate shipment.)

In accord with this precedent, the Mississippi Supreme Court separated Pittman's role in growing, ginning and delivering his cotton crop to the warehouse in Marks, from the true interstate nature of Allenberg's business, *i.e.*, delivery at some future time of Pittman's (and other farmer's) cotton from the warehouse to plants in other states.

The singular thrust of Allenberg's argument is that the transaction in question fits squarely in the mold provided by the early case of *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). However,

DAHNKE	*ALLENBERG*
1. Mill shipment,mill contract, i.e., Contract specified for delivery in foreign state. (Page 286)	1. Contract with purchaser ended at warehouse in state of production. (Record at 7)
2. Delivery aboard common carrier stated and agreed upon in contract. (Page 286)	2. Warehouse delivery to purchaser, no knowledge by seller of any further movement. (Record at 7)
3. Custom and usage — over and over mill bought for shipment to mill from the same farmer, farmer in one state, mill in the other. (Page 292)	3. A first arrangement, even Allenberg's agent in Marks did not know what would happen to the cotton. (Record at 23)
4. Buyer and seller knew wheat was going to another state. (Page 287)	4. No knowledge on the part of the seller. Vague claims on part of the buyer. Buyer claims he sold cotton before he bought it. (Record at 99)
5. Transportation involved. (Page 286)	5. Transportation not involved. (Record at 7)
6. No storage. (Page 287)	6. Indefinite storage. (Record at 7)

The court in *Dahnke* stressed the fact that delivery of the wheat was to be on board the cars (a "unitary interstate transaction".)[26] and that the plaintiff, in continuation of its prior practice, was purchasing grain for shipment to its mill in Tennessee. As described: "what otherwise seemed an intrastate transaction was a part of interstate commerce." *Id.* at 292. The small number of cases decided by this court on the specific issue of refusal by a state to open its judicial system to foreign corporations failing to qualify further point to the correctness of the decision below.

In accord with *Dahnke* it is clear that where a transaction involves interstate commerce in a pure schematic sense, any exercise of state power is invalid.[27] As with most situations falling within a Commerce Clause analysis, a finding of localized activities sufficiently *disassociated* with actual transportation in interstate commerce itself,[28] will provide a sufficient nexus for the exercise of state power.[29] Two cases

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[26]As characterized in Union Brokerage Co. v. Jensen, 322 U.S. 202, 211 (1944); *accord* Humboldt Foods v. Massey, 297 F. Supp. 236 (N.D. Miss. 1918) (direct sale *via* interstate shipment to foreign corporation).

[27]Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914) (authorizing suit by foreign corporation to demand and enforce payment on goods shipped from Iowa to defendants place of business in South Dakota); International Text Book Co. v. Pigg, 217 U.S. 91 (1910) (authorizing suit by foreign corporation against Kansas resident owing money on a correspondence course).

[28]Temporary halts, occurring either before, during or after an interstate journey constitute a well-settled factual setting for the exercise of state power. The crucial test in all circumstances, of course, is that of "continuity of transit". Carson Petroleum Co. v. Vail, 279 U.S. 95, 101 (1929). "[B]y reason of a break in transit, the property may come to rest within a state and become subject to the power of the state . . . ." Minnesota v. Blasius, 290 U.S. 1, 9 (1933). In Independent Warehouses v. Scheele, 331 U.S. 70 (1947), this Court upheld a license tax for the storage of coal alleged to be in interstate transit. *See also* United Airlines v. Mahin, 410 U.S. 623 (1973).

[29]As stated in Union Brokerage v. Jensen, 322 U.S. 202, 211 (1944): "We have considered literally scores of cases in which the states have exerted authority over foreign corporations and in doing so have dealt with aspects of interstate and foreign commerce. Whatever may be the generalities to which these cases gave utterance and about which there has been said, on the whole, relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to particular instances."

are in point.

In *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944), a customshouse brokerage business (facilitating the importation of merchandise) was denied access to the Minnesota court system on the grounds that it failed to qualify. The Court found that the Company had established a local office necessary for the transaction of interstate business. The most recent analysis by this Court is found in *Eli Lilly & Co. v. Sav-on-Drugs*, 366 U.S. 276 (1961). While alluding in dictum to the traditional rule that the Commerce Clause precludes a state from requiring a foreign corporation transacting solely interstate business to qualify, 366 U.S. at 278, the Court found promotional and service activities collateral to the company's interstate business (drug sales) sufficient to disallow utilization of the state's court system without first having secured a certificate of authority.[30]

Since this Court has not faced the present factual situation with respect to certification requirements, it is appropriate to conceptualize the type of contracting activity engaged in by

[30]An analysis similar to that found in *Eli Lilly* was earlier used by the Arkansas Supreme Court: "It has been ruled by this court that a foreign corporation comes within the purview of the statutes referred to in case they do any intrastate business so far as that character of business is concerned, even though they also engage in interstate commerce or business . . . A foreign corporation cannot avoid or circumvent the statutes by engaging in interstate business along with local or intrastate business. In other words, the courts will not permit a foreign corporation to camouflage an intrastate business with interstate business so as to avoid the penalty imposed by the statutes for doing an intrastate business without complying with the law." Sunlight Prod. Co. v. State, 183 Ark. 64, 35 S.W. 2d 342, 343 (1931).

Allenberg in the context of other exercises of state power.[31] The most feasible is state taxation, an activity recently described in the following manner.

> [When] pieces and segments of an interstate business are taxed . . . [this Court's] *cases reveals discrimination* in approving or disapproving taxes that may be imposed . . . [T]axes which "are aimed at or discriminate against (interstate) commerce or *impose a levy for the privilege of doing it, or tax interstate transportation and communication . . . or levy an exaction on merchandise in the course of its interstate journey are within the ban,* since they may "so readily be made an instrument of impending or destroying interstate commerce." *United Airlines, Inc. v. Mahin*, 410 U.S. 623, 636 (1973) (Douglas, J. Dissenting). (Emphasis added.)

The threat of taxation of interstate commerce, and the destruction thereof, is no less than the statutory penalty for noncompliance with provisions relating to the necessity for securing a certificate of authority. As shown by *Dahnke-Walker*, a free-wheeling exercise of this latter authority is perfectly capable of stopping interstate commerce in its tracks. It naturally follows that an exercise of state taxing power passing the careful "discrimination" given by this Court meets similar requisites on the issue here considered. Two cases dealing with the exact factual situation in a taxing

[31]Allenberg places great reliance on Shafer v. Farmer's Grain Co., 268 U.S. 189 (1925), to bolster its conclusions with respect to the legal ramifications of the *Dahnke-Walker Milling Co.* case. That case, however, involved an attempt to regulate grain buyers already subject to the United States Grain Standards Act. Utilizing a modified balancing test (Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), the Court found no adequate justification for the exercise of state power and concluded that it constituted a "direct interference" with interstate commerce. The Supreme Court of South Dakota describes the decision as dealing with an enactment primarily designed to regulate "buying for interstate shipment". In re Farmers Cooperative Ass'n., 69 S. D. 191, 8 N. W. 2d 557 (1943); *accord* Townsend v. Yeomans, 301 U.S. 441 (1937) (state statute fixing maximum charges for handling leaf tobacco a proper exercise of police power).

context are conclusive as to the distinct intrastate functions at issue.

In *Federal Compress Co. v. McLean*, 291 U.S. 17 (1934), the validity of a state excise tax as applied to a cotton warehouse and compress business was attacked as interfering with interstate commerce, since some of the cotton was ultimately to be shipped to out-of-state buyers. The Court, distinguishing *Dahnke*, upheld the validity of the tax, stating that before *shipping orders* are given, the cotton has not ascertainable destination without the state. "Here the privilege taxed is exercised before interstate commerce begins, hence the burden of the tax upon the commerce is too indirect and remote to transgress constitutional limitations." 291 U.S. at 22. Noting appellant's contract with a rail carrier, the Court concludes:

> It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause. 291 U.S. at 22.

In the case of *Chassaniol v. City of Greenwood*, 291 U.S. 584 (1934), it was urged that an ordinance taxing "every person engaged in the business of buying and selling cotton" violated the Commerce Clause. Rejecting an argument strikingly similar to that utilized by Allenberg, the Court stated:

> The argument is that already at that time the cotton was destined for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in *Federal Compress* . . .; and the rule there declared must govern here. *Ginning cotton, transporting it to Greenwood and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But*

> *each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce* . . .There is nothing in *Dahnke-Walker Milling Co. v. Bondurant* . . . . or in *Lemke v. Farmers Grain Co.* inconsistent with this conclusion . . . . 291 U.S. at 586-7[32] (Emphasis added.)

Allenberg finds itself in a position similar to the Eli Lilly Drug Company. Its cause of action is on a contract entirely separable from any particular interstate sale and its business activities are separable: intrastate and interstate. The intrastate aspects give rise to a valid exercise by the state in requiring that a certificate of authority be procured. Failure to do this subjects Allenberg to "the broadest and most effective sanction provided for noncompliance . . . the refusal to allow use of state courts for actions instituted by an unlicensed corporation." Note, *Sanctions for Failure to Comply with Corporate Qualifications Statutes: An Evaluation* 63 COLUM. L. REV. 117, 126 (1963).

C. CONSIDERATIONS OTHER THAN THOSE UTILIZED BY THE COURT BELOW ARE SUFFICIENT TO UPHOLD THE DECISION

Relying primarily on this Court's decisions in *Union Brokerage* and *Eli Lilly*, a substantial body of secondary authority concludes that the "interstate commerce" exception to state qualification provisions may have outlived its

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[32] In Interstate Commerce Comm'n v. Columbus & G. Ry., 153 F. 2d 194 (5th Cir. 1946), a railroad engaged a trucker to conduct seasonal business of transporting cotton from gin to warehouse and compress. The cotton was transported for the grower, on delivery to warehouse negotiable receipts were issued and the cotton remained in the warehouse for a period of from six to eight months before it moved on the rail carrier in interstate commerce. The Interstate Commerce Commission sought to enjoin the operation pending requirements with federal law. Construing the statute on the basis of *Federal Compress* and *Chassaniol*, the Fifth Circuit held that activity to be intrastate in nature and not subject to ICC regulation.

usefulness.[33] There is much to be said for determining the validity of such a qualification statute by weighing the burdens imposed on interstate business against the benefits foreign corporations receive from transacting business within the state. Similar "balancing tests" have been widely applied in amenability to process[34] and tax[35] cases.

If such a "balancing test" were to be applied, it is submitted that in a majority of cases that benefits accruing to foreign corporations would far outweigh the "burdens" or inconveniences imposed on interstate commerce, and, therefore, the application of qualification statutes to foreign corporations which conduct solely interstate business would be held to be constitutional.

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[33]"[T]here are indications that interstate commerce may no longer serve as a barrier to qualification." 17 **W. Fletcher, Cyclopedia Corporations** Sec. 8422 at 387 (perm. ed. rev. repl. 1960). *See* 2 **G. Hornstein, Corporation Law And Practice** 53 (1959); **H. Henn, Corporations And Other Business Enterprises** 116, 118, 127 (1961). Apparently anticipating a change in this general rule, the Hawaiian statute at one time provided that a foreign corporation transacting solely interstate and foreign business could nevertheless be forced to qualify. **Hawaii Rev. Laws** Sec. 174-2 (1955). This section was repealed and presently the statute is in accord with the general rule. **Hawaii Rev. Stat.** Sec. 418-7(9) (1968), *formerly* **Hawaii Rev. Laws** Sec. 174-7.5 (i) (1957). *See generally* Note, *State Regulation of Foreign Corporations: Qualification: Interstate v. Intrastate Business; Eli Lilly & Co. v. Sav-on-Drugs, Inc.*, 47 **Corn L. Q.** 300, 301-02 n. 12 (1962).

[34]International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945): "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of [state] laws . . . [These activities] may give rise to obligations, and so far as those obligations arise out of . . .the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances be hardly said to be undue."

[35]Northwestern States Portland Cement Co. v. Minnesota 358 U.S. 450, 461-62 (1959): "[Interstate commerce is not immune] from carrying its fair share of the costs of the state government in return for the benefits it derives from within the state." Braniff Airways v. Nebraska, 347 U.S. 590, 601 (1954): "Nebraska certainly affords protection during such [interstate airplane] stops and these regular landings are clearly a benefit to [the corporation]. . . ."

A "benefit" is obviously anything which contributes to profit or advantage.[36] Laying aside the critical distinctions previously drawn between Allenberg's intrastate and interstate activities, a shift in focus to a second set of depositive criteria clearly points to the "benefits" resulting from corporate entrance and utilization of Mississippi resources for purposes of profit.

(1) Access has been given to trade in the state's major agricultural commodity;

(2) Utilization of facilities throughout the state for ginning, transporting and classification of cotton;

(3) Utilization of the same facilities for warehousing pending shipment in interstate commerce.

(4) Protection afforded to cotton (while warehoused in Allenberg's name) by city and county police and fire departments.

The importance of these "benefits" to businesses such as Allenberg's cannot be underestimated. As they relate to a viable business structure and the profit incentive, these "benefits" are critical to the present capability of this company to carry on a business for profit. Indeed, those activities occurring in the state of New Jersey in the *Eli-Lilly* case cannot even begin to claim the economic impact of what now occurs in the State of Mississippi with respect to Allenberg.

On the basis of the foregoing, it is respectfully submitted that a separate and distinct analysis supports the decision below. The result being eminently correct, the appeal should be dismissed.

III. CONCLUSION

Wherefore, Appellee respectfully submits that the

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[36]One writer utilizes the following analysis: "All foreign corporations transacting business within a state receive at least the following benefits: (1) income derived from such business; (2) protection of state laws under which they conduct such business; (3) opportunity to employ, to borrow money from, and to float securities among state citizens or domestic corporations in the conduct of such business."Note, *supra* note 33.

questions upon which this cause depends are so insubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of the State of Mississippi.

Respectfully submitted,

ELLEN E. GOLDMAN
ANNA C. MADDAN
Attorneys for Appellee

George Colvin Cochran
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellee's motion to Dismiss or Affirm has been furnished to John McQuiston, II, 1400 Commerce Title Building, Memphis, Tenn.

ELLEN GOLDMAN

Appendix A

IN THE SUPREME COURT OF THE UNITED STATES

ALLENBERG COTTON COMPANY, INC.,
Appellant

v.

BEN E. PITTMAN,
Appellee

APPLICATION FOR AN EXTENSION OF TIME

TO MR. JUSTICE LEWIS F. POWELL, JR., CIRCUIT JUSTICE:

I. Application is hereby made for an extension of time within which the Allenberg Cotton Company, Inc. may docket the case, enter counsel's appearance, pay the docket fee, and file its statement of jurisdiction or petition for certiorari, and otherwise perfect its appeal to the Supreme Court of Mississippi on May 14, 1973 (a copy of which is attached and incorporated by reference herein).

II. Applicant respectfully requests said extension to and including November 12, 1973.

III. Contemporaneously with the making of this application, Allenberg Cotton Company, Inc. is filing a Notice of Appeal to the Supreme Court of the United States in the Supreme Court of Mississippi, a copy of which is attached.

IV. The need for this extension arose because of present counsel's uncertainty whether the federal question was timely raised in the Supreme Court of Mississippi. A preliminary decision was made not to take an appeal or to petition for certiori. Counsel has been informed that the question was raised, and this extension of time is requested in order to accord counsel an opportunity to secure a certificate from the

Supreme Court of Mississippi to that effect. Lynum vs. Illinois, 368 U.S. 908 (1961).

GOODMAN, GLAZER, STRAUCH
& SCHNEIDER

By William W. Goodman

By John McQuiston, II
Attorneys for Allenberg Cotton Company, Inc.

CERTIFICATE OF SERVICE

I, William W. Goodman, one of the attorneys for Allenberg Cotton Company, Inc., depose and say that on the 3rd day of August, 1973, I served a copy of the foregoing Application for Extension of Time on the attorneys for Ben E. Pittman by depositing copies of the same in the United States mails, first class postage prepaid addressed to the Hon. Ellen E. Goldman, P.O. Box 88, Marks, Mississippi, 38646, and to the Hon. Anna C. Maddan, Cliff Finch Bldg., Batesville, Mississippi, 38606.

William W. Goodman

Subscribed and sworn to before me at Memphis, Tennessee this 3rd day of August, 1973.

Stephen H. Biller
Notary Public

My commission expires: January 21, 1975.

Appendix B

B. 1

THE STATE OF TEXAS

SECRETARY OF STATE

I, MARK W. WHITE, JR., Secretary of State of the State of Texas, DO HEREBY CERTIFY that the attached is a true and correct copy of the following described instruments on file in this office:

Application for Certificate of Authority for ALLENBERG COTTON COMPANY, INC., a Tennessee corporation, for which a Certificate of Authority to transact business in the State of Texas for the purposes set forth in the application.

IN TESTIMONY WHERE, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this 29th day of October, A.D. 1973.

Mark W. White, Jr.
Secretary of State

SEAL

B. 2

STATE OF ARKANSAS

DEPARTMENT OF STATE

Kelly Bryant, Secretary of State

To All to Whom These Presents Shall Come, Greeting. I, Kelly Bryant, Secretary of State of the State of Arkansas, do hereby certify that the following and hereto attached instrument of writing is a true and perfect copy of

ALL QUALIFICATION DOCUMENTS
ON FILE IN THIS OFFICE

FOR

ALLENBERG COTTON COMPANY, INC.

Qualified in Arkansas: September 4, 1973

In Testimony Whereof I have hereunto set my hand and affixed my official Seal Done at office in the City of Little Rock, this 26th day of October, 1973.

KELLY BRYANT
Secretary of State

By HELEN BOOK
Deputy

SEAL

B. 3

STATE OF MISSOURI

JAMES C. KIRKPATRICK, Secretary of State
CORPORATION DIVISION

CERTIFICATE OF AUTHORITY

WHEREAS, ALLENBERG COTTON COMPANY, INC, (using in Missouri the name ALLENBERG COTTON COMPANY, INC.) incorporated under the Laws of the State of Tennessee for a term of perpetual years and now in existence and in good standing in said State has filed in the office of the Secretary of State, duly authenticated evidence of its incorporation, as provided by law, and has, in all respects, complied with the requirements of General and Business Corporation Law governing Foreign Corporations;

NOW, THEREFORE, I, JAMES C. KIRKPATRICK, Secretary of State of the State of Missouri, by virtue of the authority vested in me, do hereby certify that said corporation is from the date hereof duly authorized to carry on the business of (See Application) in the State of Missouri, and is entitled to all rights and privileges granted to Foreign Corporations under The General and Business Corporation Law; that the entire amount of its stated capital and surplus is $4,000,000 and $883,000 of the amount of stated capital of said corporation is represented by 17,678 shares of common + no par that the proportion of stated capital and surplus represented in Missouri is $ (none) and that its registered office in Missouri is located at 314 North Broadway, St. Louis.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the GREAT SEAL of the State of Missouri, at the City of Jefferson, this 4th day of September, 1973.

JAMES C. KIRKPATRICK
Secretary of State

RECEIVED OF ALLENBERG COTTON COMPANY, INC. Sixty-three and no/00 dollars, $63.00 For Credit of General Revenue Fund, on Account of Incorporation Tax and Fee.

DOROTHYMAE MILLER
Deputy Collector of Revenue

No. F-164030

SEAL

THE STATE OF ALABAMA

DEPARTMENT OF STATE

I Mabel S. Amos, Secretary of State, of the State of Alabama, having custody of the Great and Principal Seal of said State, do hereby certify that the foreign corporation records on file in this office disclose that Allenberg Cotton Company, Inc., a Tennessee corporation, qualified in the State of Alabama on September 6, 1973. I further certify that the records do not disclose that said Allenberg Cotton Company, Inc. has been withdrawn.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol, in the City of Montgomery, this 15th day of November, One Thousand Nine Hundred and Seventy-three.

MABEL S. AMOS
Secretary of State

SEAL

UNITED STATES OF AMERICA

STATE OF LOUISIANA

WADE O. MARTIN, JR.

I, the undersign Secretary of State, of the State of Louisiana DO HEREBY CERTIFY that a certified copy of the Articles of Incorporation and Amendments of

ALLENBERG COTTON COMPANY, INC.

A Tennessee corporation domiciled at Memphis,

Certified as a true and correct copy on August 15, 1973, by the Secretary of State of Tennessee.

Was filed and recorded in this Office on September 14, 1973, in the Record of Charters Book 303,

Thus authorizing the corporation to exercise the same powers, rights and privileges accorded similar domestic corporations, subject to the provisions of R. S. 1950, Title 12, Chapter 3, and other applicable laws.

In testimony whereof, I have hereunto set my hand and caused the Seal of my Office to be affixed at the City of Baton Rouge on, September 14, 1973.

WADE O. MARTIN, JR.
Secretary of State

SEAL

STATE OF NORTH CAROLINA

DEPARTMENT OF THE SECRETARY OF STATE

To all to whom these presents come, Greeting:

I, Thad Eure, Secretary of State of the State of NorthCarolina, do hereby certify the following and hereto attached (2 sheets) to be a true copy of

APPLICATION FOR CERTIFICATE OF AUTHORITY
OF
ALLENBERG COTTON COMPANY, INC.

the original of which is now on file and a matter of record in this office.

In Witness Whereof, I have hereunto set my hand and affixed my official seal.

Done in Office, at Raleigh, this 30th day of October in the year of our Lord 1973.

THAD EURE
Secretary of State

By CLYDE SMITH
Deputy Secretary of State

SEAL

APPLICATION BY FOREIGN CORPORATION FOR AUTHORITY TO TRANSACT BUSINESS IN THE STATE OF SOUTH CAROLINA

OFFICE OF THE SECRETARY OF STATE

Filed: September 21, 1973

Pursuant to Sec. 13.2 of the South Carolina Business Corporation Act of 1962, the undersigned corporation hereby applies for authority to transact business in the State of South Carolina, and for that purpose, hereby submits the following statement: (12.23.2 Supplement Code 1962)

(1) The name of the corporation is ALLENBERG COTTON COMPANY, INC.

(2) It is incorporated under the laws of the state of Tennessee.

(3) The date of its incorporation is 3/14/46 and the period of its duration is perpetual.

(4) The nature of business which the corporation is authorized to do in its home state is: Cotton merchants.

(5) The nature of business which the corporation proposes to do in the state of South Carolina is: Cotton merchants.

(6) The address of the registered or principal office of the corporation in the jurisdiction of its incorporation is 104 S. Front St. in the city of Memphis and state of Tennessee.

(7) The address of the proposed registered office in the state of South Carolina is 409 East North Street, in the city of Greenville, South Carolina 29602.

(8) The name of the proposed registered agent in this state at such address is C T CORPORATION SYSTEM.

(9) The aggregate number of shares which the corporation

has authority to issue is 80,000.
b. Total authorized capital stock $ No Par 80,000 No Par Shares.

(10) The aggregate number of shares which the corporation has issued is as follows: (itemize by class, par value and series if any)

No. of Shares: 80,000
Class: Common
Par Value: None

(11) The stated capital of the corporation is $883,900.

September 14, 1973

ALLENBERG COTTON COMPANY, INC.

DAVID C. BRANDON
Secretary

By BEN K. BAER
President

CERTIFICATE OF ATTORNEY

(12) I, C. Lewis Rasor, Jr., an attorney licensed to practice in the State of South Carolina, certify that in my opinion the corporation, to whose application for authority this certificate is attached, has complied with the requirements of Chapter 13, of the South Carolina Business Corporation Act of 1962, (12-23.2 b-2) Supplement Code 1962) relating to the qualification of Foreign Corporations.

Date: September 20, 1973

SCHEDULE OF FEES:
(payable at time of filing application with Secretary of State). Fee for filing application: $5.00 in addition to the above, $.40 for each $1,000.00 of the aggregate value of shares

which the corporation is authorized to issue, but in no case less than $40.00 nor more than $1,000.00

C. LEWIS RASOR, JR.
409 East North Street
Post Office Box 2048
Greenville, S.C. 29602

NOTE:
This form must be completed in its entirety before it will be accepted for filing and accompanied by a copy of its articles of incorporation and all amendments thereto or in lieu thereof, if provided for by its jurisdiction of incorporation, the corporation may furnish a restated or consolidated articles or charter duly authenticated by the proper officer of its jurisdiction of incorporation.

STATE OF TENNESSEE
COUNTY OF SHELBY

The undersigned Ben K. Baer and David C. Brandon do hereby certify that they are the duly elected and acting President and Secretary respectively, of ALLENBERG COTTON COMPANY, INC. corporation and are authorized to execute this verification; that each of the undersigned for himself does hereby further certify that he has read the foregoing document, understands the meaning and purport of the statements therein contained and the same are true to the best of his information and belief.

Dated at Memphis, Tennessee, this 14th day of September, 1973.

BEN K. BAER
President

DAVID C. BRANDON
Secretary

NOTE: This certificate has been prepared for execution by

the president (or vice president) and secretary (or assistant secretary). It may be executed by any of the persons enumerated in section 1.4 (12-11.4 Supplement Code 1962) of the South Carolina Business Corporation Act under the circumstances indicated. If anyone other than the president (or vice president) and secretary (or assistant secretary) executes the form, the wording of this verification should be changed accordingly.

B. 12

STATE OF MISSISSIPPI

OFFICE OF
SECRETARY OF STATE
JACKSON

CERTIFICATE

I, HEBER LADNER, Secretary of State of the State of Mississippi, and as such the legal custodian of the corporate records, required by Chapter 4, Title 21, Recompiled Code of Mississippi of 1942, as amended, to be filed in my office, do hereby certify that

ALLENBERG COTTON COMPANY, INC.

a corporation, duly chartered under the laws of the State of Tennessee, has filed a duly certified copy of its charter of incorporation in this office and has obtained a certificate of authority to do business in this State, under the provisions of Chapter 4, Title 21, Recompiled Code of Mississippi of 1942, as amended, and as shown by the records in this office. (Qualified to do business in Mississippi on May 29, 1973.)

I further certify that said corporation has filed in this office an appointment of registered agent for service of process, with written acceptance endorsed thereon, and/or power of attorney, designating as its agent and/or attorney for service of process in this State, C T CORPORATION of 118 North Congress Street, Jackson, Mississippi.

I further certify that said Corporation has paid the fees for filing the above papers required by law as shown by the records of this office, and that said corporation is in good standing to do business in Missisippi at this time.

Given under my hand and Seal of Office, this the 29th day of October, 1973.

HEBER LADNER
Secretary of State